

First Amendment Rights, Union Dues, and Politics

Does a state campaign finance law that prohibits labor unions from seizing and using wages of nonmembers for partisan political campaigns without their consent violate the labor unions' First Amendment rights?

On June 14, 2007, the U.S. Supreme Court took up that question in *Gary Davenport, et al. v. Washington Education Association (WEA)* and ruled that states can require public-sector labor unions to obtain permission from their nonunion members before spending agency shop fees on political activities, such as campaigns.

Agency shop fees are the union fees that nonunion employees are required to pay in lieu of union dues. Currently, 28 states permit unions to collect mandatory agency fees from all their public-sector employees, whereas 22 states, commonly referred to as right-to-work states, disallow this practice.

In Washington State, approximately 95% of the public education employees who are eligible for union membership join the Washington Education Association and do not formally contest the teacher union's partial use of their union membership dues for political activities. The *Davenport* case focused on whether the WEA could use the agency shop fees of the 5% of employees eligible for WEA member-

ship who chose not to join, for political activities without the nonunion employees' consent. The WEA contended that restricting its use of the fees constituted a violation of the union's First Amendment rights.

At Issue

The *Davenport* case originated from a 1992 provision of Washington's Fair Campaign Practices Act. Section 760 of the act states that "a labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."

Gary Davenport and more than 4,000 additional public school teachers in the state claimed that the WEA failed to obtain the "affirmative authorization" required by Section 760 and sued the WEA.

The WEA argued that the law was burdensome and curtailed the union's right to engage in political advocacy—thus violating its First Amendment rights. Initially, a Washington trial court ruled against the WEA. However, on appeal, the state's court of appeals reversed the trial court's decision, finding that the Section 760 provision was indeed



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unconstitutional since it was too burdensome on the public-sector union's freedom of speech rights.

Earlier this year, the Washington Supreme Court agreed with the court of appeals' finding, ruling that the burden must fall on the nonunion public employees to assert their rights and formally object to spending agency shop fees for political purposes.

The Supreme Court Weighs In

The case made its way to the U.S. Supreme Court, where on June 14, 2007, the Court unanimously upheld the Washington State law. Writing for the Court, Justice Scalia commented that the Washington Supreme Court erred in its decision finding Section 760 of the Fair Campaign Practices Act unconstitutional and an undue burden on the First Amendment rights of public-sector unions. Justice Scalia reasoned that the Washington Supreme Court's decision in *Davenport* was based on a misinterpretation of two major agency shop fee cases, *Abood v. Detroit Board of Education* (1977) and *Teachers v. Hudson* (1986).

The legal arm of the *Davenport* ruling does not reach very far. For instance, the ruling simply allows individual states to set their own provisions if they so choose.

In *Abood*, the Supreme Court held that the First Amendment expressly prohibits public-sector unions from using nonmembers' agency fees for ideological purposes unrelated to the union's collective-bargaining duties and responsibilities. In *Hudson*, the Court imposed the procedural requirement that public-sector unions inform nonunion employees of exactly how much of their agency shop fees were allocated to non-collective-bargaining purposes and offer non-member employees a refund for that amount (Lane 2006).

To legally comply with these two leading judicial mandates, many public-sector unions send what are often referred to as "*Hudson* packets" to all their nonmembers informing them of their legal right to refuse permission to spend any of their agency shop fees for purposes unrelated to collective bargaining.

In its most recent case dealing directly with a union's use of agency shop fees, *Communication Workers v. Beck* (1988), the Supreme Court ruled that unions have no legal right to use the mandatory fees of nonunion employees to advance politically related endeavors over those employees' objections and that nonmembers may only have to pay mandatory agency shop fees for proven and justified collective-bargaining-related costs. Under the *Beck* ruling, however, the sole responsibility to ascertain whether unions were spending nonunion agency shop funds on political activities fell disproportionately on workers, and the duty of unions to inform was minimal.

Since the Court has not previously held that a First Amendment issue arises when a government entity sanctions or limits a public union entitlement to agency shop fees beyond the legal scope of either the *Abood* or *Hudson* rulings, all nine justices agreed that the First Amendment was not applicable in the *Davenport* dispute. Justice Scalia stated, "The agency fee cases did not balance constitutional rights in such a manner because unions have no constitutional entitlement to nonmember-employees' fees." He further elaborated on this particular point, saying, "Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than those fees by nonmembers who refuse to give their approval."

Justice Breyer joined the Court's decision and its reasoning that past jurisprudence involving agency shop fees simply created a minimum set of safeguards for the rights of nonmember employees working in the public sector and did not constitute a First Amendment violation.

Discussion and Conclusions

Although the Court's unanimous decision in *Davenport* reinforced the legal precedent that states have the legal right to prevent public-sector unions, including teacher unions, from using the compulsory union fees of its nonmembers for politically related endeavors, the *Davenport* ruling and its subsequent effect on other states are limited.

First, the *Davenport* ruling applies solely to public-sector unions and does not include workers employed in the private sector. Second, under the National Labor Relations Act, states are afforded legal discretion in governing the regulation of their labor relationships with public-sector employees.

The legal arm of the *Davenport* ruling does not reach very far. For instance, the ruling simply allows individual states to set their own provisions if they so choose. Although *Davenport* can undoubtedly be viewed as a legal victory for workers against public-sector unions, the decision falls noticeably short of remedying the full spectrum of potential abuses commonly associated with compulsory union dues as a precondition of employment in many public or private unions throughout the country. ■

References

- Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).
- Communication Workers v. Beck*, 487 U.S. 735, 747 (1988).
- Gary Davenport, et al. v. Washington Education Association (WEA), 551 U.S. ____ (2007).
- Lane, C. .2006. "Justices to decide on use of union fees for politics." *Washington Post*, September 27. <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/26/AR2006092600983.html>.
- Teachers v. Hudson*, 475 U.S. 292 (1986).

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